

NEW RULE. (1) A person may apply to the department for a variance from a water quality standard if the conditions at §75-5-222(2)(a)(i) and (ii), MCA are met. The applicant must demonstrate to the department that one of six factors at 40 CFR 131.14(b)(2)(i) apply. The applicable factors are:

- a. Human caused conditions or sources of pollution prevent the attainment of the use and cannot be remedied or would cause more environmental damage to correct than to leave in place; or
- b. Controls more stringent than those required by sections 301(b) and 306 of the Act would result in substantial and widespread economic and social impact.

(2) The department shall review each application to determine whether a reasonable alternative, including but not limited to a permit compliance schedule, reuse, or other department actions already in place (e.g., a TMDL) would eliminate the need for the variance. If the department makes a preliminary finding that a reasonable alternative to approving a variance is available, the department shall consult with the applicant prior to making a final decision to approve or deny the variance.

(3) If, after consultation with the applicant, the department determines that no reasonable alternative to a variance exists, the department shall determine whether the information provided by the applicant pursuant to (1) adequately demonstrates the need for the variance. If the department finds that a variance is needed, the department shall approve a discharge variance which reflects the highest attainable water quality condition. The department shall consider any guidance developed by the department or EPA when establishing the highest attainable water quality condition. The variance will become effective and be incorporated into the applicant's permit only after adoption by the board in a formal rulemaking proceeding.

(4) The basis of the variance must be reviewed by the department every 5 years. If, during the previous 5 years, remedial activities have resulted in improved water quality in the receiving waterbody, recipients of variances will be required to treat the pollutant to concentrations no higher than the ambient upstream condition of the waterbody as characterized for the previous 2 years. The ambient upstream condition must be characterized using any guidance developed by the department. The department will review the water quality status of the waterbody upstream of the discharge, evaluate whether or not the variance recipient's proposed effluent levels for the next 5 years will meet the listed conditions, and issue a solicitation for public comment on variances which have been issued under this rule. The proposal will solicit comments from the public on whether the variances should be: (1) extended without modification, (2) modified and extended, or (3) allowed to expire. Based on the review conclusions and the public comment, the department will draft final findings and conclusions and will initiate rulemaking if it determines that the variances should be extended, with or without modification. Recipients of variances may receive a compliance schedule from the department in order to meet the more stringent requirements of the variance.